

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 September 2011

Public Authority: Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Summary

The complainant requested copies of both paper and electronic records of all minutes and papers from the Special Advisers Remuneration Committee since 6 May 2010 and asked a number of questions concerning the operation and decisions of that body. The Cabinet Office initially refused to disclose any information on the basis of section 36(2)(b). In submissions to the Commissioner, the Cabinet Office subsequently advised that it was also refusing to disclose the information under section 40(2). The Commissioner has found that some of the information was exempt under section 36(2)(b) and that the public interest in maintaining the exemption outweighed the public interest in disclosure. However, the Commissioner has found that neither section 36(2)(b) or section 40(2) was engaged with regard to some of the information and has therefore ordered disclosure of the non-exempt information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Special advisers (often abbreviated to 'SpAds' or 'Spads') are temporary civil servants appointed under Article 3 of the Civil Service Order in Council 1995. In common with all civil servants they are bound by the *Civil Service Code* (except sections one and five which relate to the impartiality and objectivity of the Civil Service and civil servants and the

future aspects of paragraph nine which relate to future administrations and potential future Ministers). However, special advisers also differ from the majority of permanent civil servants because they are exempt from the general requirement that civil servants should be appointed on merit and behave with political impartiality and objectivity. As set out in the *Ministerial Code*, all appointments of special advisers require the prior written approval of the Prime Minister.

3. The role of 'special adviser' is defined in Section 15 of the Constitutional Reform and Governance Act 2010. The Model Contract For Special Advisers (published by the Cabinet Office in June 2010) lists the twelve 'sorts of work' that a special adviser may do to assist their Minister. Paragraph 6 of the Model Contract states that special advisers, 'are employed to serve the objectives of the Government and the Department in which they work. It is this which justifies their being paid from public funds and being able to use public resources, and explains why their participation in party politics is carefully limited'. Special advisers have assumed public prominence in recent years due to a number of incidents reported in the media and the high profile identity and influence of some holders of such positions.

The Request

4. The complainant submitted the following request to the Cabinet Office on 11 June 2010:

'I would like to see both paper and electronic records of all (a) minutes and (b) papers from the Special Advisers Remuneration Committee since 6 May 2010'.

5. The complainant made a further and related request on 1 July 2010, confirming that:

'I would like to see both paper and electronic records in respect of the Special Advisers Remuneration Committee that clearly allow me to ascertain the following:

A) How many times the Committee has met since 12 May.

B) I would like to be given details of the previous pay in respect of each special adviser that is now in post. By this, I mean details of what they were paid before taking up their role as a special adviser.

- C) *How many of the special advisers who are now in post have received a 5 percent uplift – or more – on their salary compared to their previous job before they became a special adviser.*
- D) *How many recommended salary levels were overturned by members of the Committee since 12 May.*
- E) *I would also like you to publish all of the minutes of meetings held in respect of the Committee since 12 May'.*
6. The Cabinet Office provided the complainant with a joint response to both requests on 8 July 2010. The Cabinet Office informed the complainant that the information he had requested was being withheld. The complainant was simply told that, *'The exemption which applies to this information is section 36 of the Freedom of Information Act. The public interest test determines that the release of such information would prejudice the purpose of the exemption'.*
7. The complainant contacted the Cabinet Office on 21 July 2010 in order to ask for an internal review. In submitting this request for an internal review the complainant stated that he did not agree that section 36 applied to his request and noted that, *'The response I have been given fails to address even the most basic questions contained within my request such as how many times the Committee has met since 12 May'.*
8. The complainant went on to comment that, *'While I understand that there is often a requirement for redacted information to be issued in such cases, the Government themselves have chosen to publish the names and salary levels of all special advisers. I therefore do not think it is unreasonable for me to ask for more information than is usual for a Department to provide in this instance'.*
9. The Cabinet Office provided the complainant with its internal review decision on 11 August 2010. Confirming that the original refusal was upheld under section 36(2)(b), the Cabinet Office explained as follows. *'The provision of advice is an integral part of work relating to the Special Advisers Remuneration Committee (SARC). Views and advice are often exchanged between officials in departments and with SARC, in confidence. This gives both Ministers and officials the space to explore options. The views exchanged may include proposals or issues for further deliberation and thought, before final decisions are taken. When applying the public interest test, our conclusion is that the disclosure of these records would:*
- *be likely to distort or restrain these discussions; and*
 - *be likely to inhibit the decision-making process'.*

The Investigation

Scope of the case

10. On 11 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically drew the Commissioner's attention to the fact that the Cabinet Office had failed to provide, *'even the most basic information'*.
11. In submissions to the Commissioner, the Cabinet Office advised that it does not routinely hold information relating to the pre-Government earnings of special advisers. With regard to the specific questions posed by the complainant, the Cabinet Office informed the Commissioner that as there had been no meetings of SARC since the date specified in the request, questions A, D and E of the request were *'irrelevant'*. The Cabinet Office added that it would expect section 36(2)(b) to apply to any future requests for minutes of the Committee.
12. As the Commissioner told the Cabinet Office, the fact that no meetings of SARC had taken place since 12 May 2010 was not irrelevant to the request; it meant that the information requested concerning such meetings was not held and this fact should have been made clear to the complainant in the refusal notice. Therefore, it is the case that some of the information requested by the complainant did not exist at the time of the request. The Commissioner is satisfied that he has been provided with all the relevant information following within the request. These are:
 - The Terms of Reference of SARC;
 - Two emails concerning suggestions/advice from civil servant officials with regard to the composition of the Committee and the salary to be agreed for a named special adviser;
 - The CV of the named special adviser;
 - The Job Description of the names special adviser.
13. During the course of the Commissioner's investigation, and having confirmed with the Cabinet Office that they would have no objection, the Commissioner informed the complainant that two of the documents within scope of his request concerned the CV of a named special adviser and the job description of that same special adviser. The complainant confirmed that he was happy for these two documents to be removed from the scope of his request as he would be contacting the Cabinet Office separately to query the use of the section 40(2) exemption with

regard to the job description. Consequently, the Commissioner's Decision focuses on the information covered by the first two bullet points in paragraph 12 above.

Chronology

14. The Commissioner wrote to the Cabinet Office on 2 December 2010, requesting copies of the withheld information and further explanation and rationale for its use of the section 36(2)(b) exemption.
15. The Cabinet Office responded to the Commissioner on 4 February 2011, providing copies of the withheld information and addressing the questions posed in the Commissioner's letter. In addition to the section 36(2)(b) exemption, the Cabinet Office informed the Commissioner that it also considered the information requested to be exempt under section 40(2), *'as it constitutes the personal data of the individual SPAD in question'*.
16. Upon examining the withheld information, and the accompanying Cabinet Office representations, the Commissioner was satisfied that some of the information was not exempt from disclosure under either section 36(2)(b) or section 40(2).
17. The Commissioner therefore contacted the Cabinet Office on 23 February 2011 and advised the Cabinet Office to voluntarily disclose the non-exempt information to the complainant. The Cabinet Office indicated that it was not prepared to disclose the information concerned without being ordered to do so by the Commissioner.
18. The Commissioner spoke with the Cabinet Office further on 27 April 2011, and was informed that the Cabinet Office had now decided (for reasons apparently not specifically connected to this complaint) to disclose the non-exempt information to the complainant and to the public by way of the Cabinet Office website. The Commissioner was informed that this disclosure was due to take place in mid-May 2011.
19. The Commissioner contacted the Cabinet Office on 10, 16 and 20 May 2011 to ascertain when the complainant could expect to receive the non-exempt information (a one page document amongst the withheld information in this case). The Cabinet Office could not specify when the non-exempt information was going to be provided to the complainant (and published on the Cabinet Office website). In light of the stance taken by the Cabinet Office, the Commissioner confirmed that he would reach a finding with regard to the non-exempt information in the formal Decision Notice.

Analysis

Exemption – section 36(2)(b)

20. Section 36(2)(b) provides that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - ...

...(b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or*
- (ii) the free and frank exchange of views for the purposes of deliberation...'*

21. In order for section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to inhibit, the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.

22. When investigating cases involving the application of section 36, in order to establish whether the exemption has been applied correctly, the Commissioner has:

- Ascertained who is the qualified person or persons for the public authority in question;
- Established that an opinion was given;
- Ascertained when the opinion was given; and
- Considered whether the opinion given was reasonable.

23. In deciding whether the opinion was 'reasonable' the Commissioner has been guided by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that *'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at'*. In relation to the issue of reasonable in substance, the Tribunal indicated that *'the opinion must be objectively reasonable'*.

24. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of

likelihood that inhibition or prejudice may occur and thus, *'does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) of the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'*. Therefore, when assessing the reasonableness of an opinion, the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of inhibition of any disclosure (or prejudice caused).

The engagement of section 36

25. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the Commissioner has established that the opinion was given by the Rt Hon Francis Maude MP, Minister for the Cabinet Office. Clearly he was an appropriate qualified person for these purposes.
26. In its submissions to support the application of section 36, the Cabinet Office has explained the process by which this opinion was provided. A submission setting out the details of the case was sent to the Minister. This submission included copies of the information considered to fall within the scope of the request, a summary of the role of SARC, and a description of the typical contents of the papers relating to the work of SARC. The Minister was also provided with anonymised copies of both of the complainant's FOI requests. The Minister provided his opinion (that the exemption was engaged) on 8 July 2010.
27. The Commissioner notes that the submissions provided by the Cabinet Office do not specifically explain what factors the Minister considered in forming the view that disclosure would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. However, in this regard, the Commissioner has been guided by the Tribunal's comments in the case *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)*, in which the Tribunal made clear that:

'where the opinion is overridingly reasonable in substance, then even though the method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion'.
28. In the absence of evidence that explicitly explains why the qualified person considered the information in question to be exempt, the Commissioner is prepared to assume that the arguments in the submission to him were adopted by the Minister. The Commissioner is

satisfied that the opinion appears to be overridingly reasonable in substance with regard to some but not all of the information concerned. Paragraphs 30 and 31 below explain why the Commissioner does not consider the opinion to be reasonable in respect of the Terms of Reference document.

29. Specifically, the Commissioner finds that section 36(2)(b) applies to the two emails containing suggestions/advice from civil servant officials with regard to the composition of the SARC and the salary suggestions/proposals for a named special adviser. The Commissioner accepts that disclosure of this specific information would reveal free and frank discussions. This could well lead to civil servants and Government departments being less open and willing to provide such views or advice to SARC for the purpose of its deliberations because they would be concerned that such discussions might be placed in the public domain.
30. As the Cabinet Office explained in its submission to the Commissioner, the two emails were, *'considered to be examples where officials were freely giving views intended for internal deliberation with other officials, and including suggested options for consideration'*. With regard to section 36(2)(b), the Commissioner considers that it is reasonable to conclude that disclosure of such candid and informal views and advice for SARC would be likely to result in officials and departments being less likely to share this type of exchange in future, or limit the amount (and therefore the usefulness) of such information.
31. Having considered the Terms of Reference of SARC, the Commissioner is satisfied that this one page document is not exempt from disclosure as claimed by the Cabinet Office. Section 40(2) is not engaged as the document does not contain any personal data. Unlike the emails considered above, the document does not contain any individual views or opinions; it simply confirms the Committee's terms of reference (including a list of factors to which the Committee shall have regard when making recommendations to the Prime Minister). The Commissioner considers that it is not reasonable to think that disclosure of this document, given the factual nature of its contents, could possibly inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, and therefore section 36(2)(b) cannot apply.

Public interest test

32. Section 36(2)(b) is a qualified exemption. Having concluded that the two emails are exempt the Commissioner is required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

33. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice.'

34. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus *'does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant.* Therefore, in the Commissioner's opinion, this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the free and frank provision of advice or exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

35. In its submissions to the Commissioner, the Cabinet Office has asserted that, *'There is no obvious benefit to the general public in revealing these documents, or specific information from them. They concern named individuals and factors considered in the decision making process for a specific salary and the membership of an internal Committee.'*
36. With regard to the second email, this concerns suggestions for the possible composition of SARC following the change of government administration and the formation of the Coalition Government. Given the political nature of the role of SPADs, the way in which this issue was tackled in the context of a coalition government is a matter of public interest.
37. As the present Government has recognised with its promotion of the openness and transparency agenda (set out in section 16 of the Coalition Agreement) there is a public interest in the transparency and accountability of government policies and decisions and the use of funds

raised through public taxation. The Commissioner considers that this public interest is particularly pertinent to the appointment and role of special advisers, since they (unlike permanent civil servants) operate from a party political viewpoint, rather than the position of political neutrality held by the traditional civil service.

38. In line with the movement towards greater transparency and accountability, the present Government published the names, numbers and salaries (if earning £58,200 or higher) of all special advisers in June 2010. In his request for an internal review of the Cabinet Office decision, the complainant himself highlighted the fact that, *'the Government themselves have chosen to publish the names and salary levels of all special advisers. I therefore do not think it is unreasonable for me to ask for more information than is usual for a Department to provide in this instance'*. In June 2010, when the request was made, the number of special advisers stood at 68.
39. The Commissioner considers that the disclosure of such special adviser details reflects an awareness and acceptance on the part of government as to the public interest in such roles. Similarly, the Commissioner is of the view that a corresponding public interest attaches to the role of SARC and the advice and recommendations which it provides to the Prime Minister with regard to the pay of special advisers.

Public interest arguments in favour of maintaining the exemption

40. In submissions to the Commissioner, the Cabinet Office put forward public interest arguments for maintaining the section 36(2)(b) exemption. Significantly, the Commissioner notes that these arguments were put forward with reference to the two emails falling within scope of the complainant's request, rather than the other three documents.
41. As noted above, the Cabinet Office contended that both emails were examples of officials freely giving views intended for internal deliberation and consideration with other officials.
42. The Cabinet Office advised the Commissioner that the SARC Secretariat *'does not routinely hold information relating to the pre Government earnings of special advisers'*. The Cabinet Office explained that the SARC Secretariat might discover this information in the course of discussions with Government departments concerning individual cases. Elaborating upon its concerns, the Cabinet Office stated that, *'If any information held under 'SARC papers', including numerical data, were to be disclosed, our concern would be that departments may be less likely to share this type of exchange in future, or they may provide more limited information. Information passed to the Secretariat on individual cases may become less open, diminishing the quality of the evidence*

available to the SARC. As a result it would make it more difficult for the Secretariat to advise departments of their approach, and/or it may impede the decision making process of SARC. The impact of this would be that the effectiveness of SARC, and its Secretariat, would be reduced'.

43. Given that part of the role of SARC is to provide recommendations as to the pay of individual special advisers, it seems slightly surprising that the SARC Secretariat does not itself hold some information concerning the previous earnings of such advisers. Such information would clearly have a bearing on the specific salary to be agreed for a specific special adviser. In the absence of such information, it would appear that SARC is instead reliant on information such as that provided by other government departments. The Commissioner therefore accepts that any disclosure which might inhibit such channels of communication (however ad hoc), would pose a resultant risk of limiting the effectiveness of SARC.

Balance of the public interest arguments

44. In considering where the balance of the public interest lies with regard to the two emails, the Commissioner is mindful that, for reasons explained above, the public benefit in having sight of two documents which are specific in what they concern is limited. Neither document is particularly instructive to the public in informing them about what SARC does and its influence within government. However, disclosure of one of the emails would provide the public with some (albeit slight) insight into the type of considerations and factors which go towards the assessment and fixing of salaries of special advisers.
45. Having considered the severity, extent and frequency of prejudice or inhibition to the free and frank provision of advice or exchange of views for the purposes of deliberation which disclosure of the two emails might pose, the Commissioner considers that there is a real risk that disclosure might affect the openness and candour of what are clearly intended as being formative suggestions/views for internal use only.
46. The Commissioner accepts that there is a significant public interest in ensuring a private space for free and frank provision of advice, and deliberations of such advice, with regard to the work of SARC. Having viewed the withheld information, the Commissioner considers this to be a highly relevant factor in favour of maintaining the exemption in this case.
47. The Commissioner considers that there is a public interest in the public being informed as to the number and salaries of senior special advisers working within Government, to promote transparency and appropriate

scrutiny. However, at the time of the request, the Government had published (on 10 June 2010) the names and salaries of all special advisers in post earning £58,200 or higher. The two emails within scope of the request would not further this public interest to any significant degree, given the comprehensive nature of the information already in the public domain.

48. Therefore, for the reasons detailed above, the Commissioner considers that the Cabinet Office was correct to withhold the two internal emails on the basis of section 36(2)(b).
49. As the Commissioner has found that the two internal emails are exempt by virtue of section 36(2)(b), he has not gone on to consider the section 40(2) exemption in relation to this information.

Procedural Requirements

Sections 1 and 10

50. In failing to disclose within 20 working days of receipt of the request the information which the Commissioner now concludes was not exempt by virtue of either section 36(2)(b) or section 40(2) (SARC Terms of Reference), the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

The Decision

51. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 36(2)(b) correctly to some of the withheld information. However, the Commissioner also finds that none of the exemptions cited applied to the remainder of the withheld information and that, in failing to disclose this, the public authority breached the requirements of sections 1(1)(b) and 10(1).

Steps Required

52. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose to the complainant the SARC Terms of Reference document.
53. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

54. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

55. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- the initial refusal notice provided to the complainant by the Cabinet Office was insufficient and unduly brief, failing to specify either which sub-section of section 36 the information was being withheld under or the grounds for the use of the exemption. Although a rationale (and confirmation of the specific sub-section) was provided to the complainant in the internal review decision, the Commissioner would expect a public authority, particularly a central government department, to provide a much clearer and detailed response in the initial response to FOI requests.
 - the Commissioner would also note his disappointment that the Cabinet Office failed to avail itself of the opportunity, during the Commissioner's investigation, to voluntarily disclose to the complainant the specified non-exempt information.

Right of Appeal

56. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

57. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 8th day of September 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Section 36(2)(b) provides that –

‘Information to which this section applies to exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act would, or would be likely to, inhibit

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation.’

Section 40(2) provides that –

‘Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied

(3) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of ‘data’ in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.’